APPENDIX A

The McCarran-Ferguson Act

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June

19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Approved March 9, 1945.

APPENDIX B

Interlocutory Order Denying Application for Disclosure of Information

[Caption omitted]

This matter having been heard by the Commission upon the application of counsel for American Life and Accident Insurance Company, respondent in the above-captioned proceeding, for the disclosure of certain documents or information in the Commission files; the applicants stating that the documents or information requested, if

obtained, will be used as evidence in opposition to the Commission's complaint charging American Life and Accident Insurance Company with the use of unfair and deceptive acts and practices in connection with the advertising and sale of insurance coverage; and

The Commission having duly considered said application and having concluded that, aside from the fact that certain of the documents requested are confidential material to which the applicants have shown no legal right and the disclosure of which would be contrary to the public interest, the documents or information requested are in no way relevant or material to any issue in the proceeding and that, therefore, the applicants have shown no real *or actual need* for the disclosures sought; the reasons for such conclusion being substantially the same as those for which the Commission, in its per curiam opinion rendered on January 10, 1956, denied the application of the respondent in the matter of Postal Life and Casualty Insurance Company, Docket 6276, for disclosures similar to those sought by this application:

IT IS ORDERED that the application of counsel for American Life and Accident Insurance Company for the release of information be, and it hereby is, denied.

By the Commission.

s/ ROBERT M. PARRISH
Robert M. Parrish,
Secretary.

(SEAL)

ISSUED: January 11, 1956

Order Denying Relevance of Trade Practice Rules and Procedures

In the Matter of

POSTAL LIFE AND CASUALTY INSURANCE COMPANY,
a corporation

Docket No. 6276

OPINION OF THE COMMISSION

Per Curiam:

This matter is before the Commission on cross-appeals from certain actions of the hearing examiner.

The complaint charges respondent with having used misleading and deceptive representations in connection with the advertising and sale of certain of its accident and health insurance policies. During the course of the hearings on the complaint, the hearing examiner, upon application of the respondent, issued a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files. A motion by counsel supporting the complaint to quash the subpoena was granted in part and denied in part by the hearing examiner. Respondent has appealed from the hearing examiner's action of quashing that portion of the subpoena which demanded the production of certain memoranda or other writings prepared by members of the Commission's staff. In the alternative, respondent, in its appeal, has requested that the Commission order the release of the documents sought. Counsel supporting the complaint, on the other hand, has appealed from the hearing examiner's failure to quash the subpoena in its entirety. Counsel supporting the complaint has also appealed from the hearing examiner's action of permitting respondent to introduce testimony as to the past course of dealing between the respondent and the Commission and has requested the Commission to order certain testimony stricken from the record.

We consider first the subpoena duces tecum issued by the hearing examiner.

Pursuant to statutory authority, the Commission, like most other agencies and departments of the Federal Government, has prescribed rules and regulations covering the custody, use and protection of material and information coming into its possession, or within the knowledge of the Commission or any of its officers or employees in the discharge of their official duties. Respondent, in its appeal, does not question the legality of these rules and regulations. Under the prescribed rules, the release of confidential information or material from the Commission's files may be authorized only by the Commission itself. The procedure to be followed by a party desiring the disclosure of information or material from the Commission files is clearly set forth in § 1.134 of the Rules. No other method for obtaining the release of confidential information is provided for in the rules. It follows that the hearing examiner has no authority to require the production of information or material from the Commission's files by a subpoena duces tecum or otherwise. The hearing examiner, therefore, erred in issuing the subpoena and also in failing to grant in its entirety the motion of counsel supporting the complaint to quash the subpoena. Accordingly, insofar as the appeals relate to the subpoena duces tecum issued by the hearing examiner directing the Secretary of the Commission to produce certain documents or information, the appeal of the respondent is denied and the appeal of counsel supporting the complaint is granted, and the subpoena will be quashed.

We consider next respondent's alternative request, under § 1.134 of the Commission's Rules of Practice, that the Commission order the release and production of the documents sought. As indicated by the rule, the Commission in determining the action to take upon an application for the release of confidential information will consider not only whether or not the information or material sought is confidential or privileged so far as the applicant is concerned, but also the purpose for which the applicant intends to use the information or material. Here, the applicant states that the documents requested will be used as evidence in

opposition to the Commission's complaint. It, therefore, is necessary to consider whether or not the data requested would in any way be helpful to the respondent in establishing a valid defense to the proceeding. This, in turn, requires a consideration of the asserted defense to which the applicant claims the information and material is relevant. This is especially required in connection with the application since some of the documents requested are already in evidence and, therefore, available to the applicant, and the applicant has made no showing that it does not have copies or originals of certain of the other documents requested.

As a defense to the proceeding, respondent alleges that it accepted and adhered to the Trade Practice Rules Relating to the Advertising and Sales Promotion of Mail Order Insurance promulgated by the Commission, that it submitted its insurance policies and literature to the staff of the Commission's Bureau of Consultation and that the Bureau approved, or failed to disapprove, the practices challenged by the complaint. In support of this defense, respondent cites the Commission's action in dismissing the complaints in *Argus Cameras, Inc.*, D. 6199, and *Wildroot Company, Inc.*, D. 5928. In both of those proceedings, the complaints were dismissed after a showing by the respondents that the particular practices challenged by the complaints had been abandoned and that there was no likelihood of the practices being resumed. Evidence as to the respondent's past course of dealings with the Commission was considered in connection with the determination as to whether or not there was likelihood that the practices might be resumed.

In the instant case, respondent makes no claim that it has discontinued any of the practices challenged by the complaint. The question here is whether or not the respondent has engaged in unfair and deceptive acts and practices as alleged in the complaint. Respondent's prior course of dealing with the Commission, or with members of its staff, has no bearing on whether the respondent has engaged in the alleged unlawful practices. If it were

established that the Commission, or a member of its staff, had at some time in the past conveyed to the respondent the impression that the practices involved were not objectionable, that fact would constitute no valid defense to this proceeding. (*Book-of-the-Month Club* v. *F.T.C.*, 202 F. 2d 486, 1953; *In the Matter of Carpel Frosted Foods, Inc.*, et al., 48 F.T.C. 581, 1951.) Aside from the fact that certain of the documents requested, namely, memoranda prepared by members of the Commission's staff, are confidential material to which the respondent has shown no legal right and the disclosure of which would be contrary to the public interest, we do not believe that the applicant has shown any real or actual need for the disclosures requested. Respondent's application for the release of information, therefore, is denied.

This leaves for consideration that portion of the appeal by counsel supporting the complaint relating to the hearing examiner's rulings permitting the introduction of testimony as to the past course of dealing between the respondent and the Commission and the hearing examiner's refusal to rule on the motion of counsel supporting the complaint that the testimony of Alvis Layne, Jr., Henry Miller, and Donald K. King be stricken. The reception of evidence is the function of the hearing examiner, Administrative Procedure Act, Section 7(b), 60 Stat. 241, 5 U.S.C. 1006(b), Commission Rules of Practice, § 3.15 (c), and it is for him, during the course of trial, to admit or exclude testimony and other evidence. The correctness of his rulings in that regard can best be determined at the conclusion of the hearing when the matter comes before the Commission for final decision on the merits. We therefore deny this portion of the appeal by counsel supporting the complaint.

In the view we take on the appeals and the application, oral argument thereon, which was requested by respondent, is not necessary and would serve no useful purpose.

An appropriate order will be entered.

January 10, 1956.

The Final Opinion and Order in the Federal Trade Commission, and the Opinion, Judgment, Final Order, and Order Denying Petition for Rehearing in the Court of Appeals in American Life & Acc. Ins. Co. v. FTC, Dkt. No. 15828 (8th Cir. 1958)

The Final Opinion of the Federal Trade Commission

[Caption omitted]

By Secrest, Commissioner:

Respondent American Life and Accident Insurance Company is engaged in the sale of accident and health insurance and is licensed to do business only by the State of Missouri. It conducts its business in all other states by mail. The complaint herein charged respondent with false and misleading and deceptive practices in the solicitation and sale of one of its accident and health policies in violation of Section 5 of the Federal Trade Commission Act. As indicated, only respondent's "Provider" or "New Provider" policy is involved here. The complaint charged four specific misrepresentations as to the "New Provider" policy covering:

(1) its renewability or duration;

(2) the maximum amounts provided for surgical operations under a surgical schedule;

(3) certain limitations upon travel death benefit provisions; and

(4) the general classes of sickness and accidents covered.

The hearing examiner's initial decision dismissed the charge in the complaint relating to renewability or duration. He found that representations as to maximum amounts payable for surgical operations were false and misleading. As to representations with regard to travel death benefit provisions, the initial decision found respondent's representations in this regard to constitute

unfair and deceptive advertising. With respect to the charge of misleading advertising of indemnification for all sickness and accidents, the hearing examiner found these generally to have been substantiated but failed to declare as false and misleading specific representations attacked in the complaint regarding indemnification for conditions existing prior to the effective date of the policy, coverage for childbirth, indemnification for surgery required prior to expiration of six months from the effective date of the policy, and coverage for sickness or accident "incurred during service in the armed forces, or treated in Government hospitals, or provided for under Workmen's Compensation Laws."

Finally, the hearing examiner made the requisite findings as to the existence of public interest and jurisdiction and concluded that respondent's advertising representations were unfair, misleading and deceptive in the respects indicated. He ordered the complaint dismissed, however, on the ground:

> "that since the acts and practices complained of in this proceeding have been discontinued and no reasonable likelihood exists that they will be resumed by respondent, all that could be accomplished herein by the issuance of a cease and desist order has already been accomplished * * *."

Counsel supporting the complaint have appealed from the initial decision and the matter is now before us for final decision on the merits on the basis of the whole record, briefs on appeal and in opposition thereto and on oral argument before the Commission.

Counsel supporting the complaint contend that respondent has failed to provide any reasonable basis for dismissal of the complaint on the ground of discontinuance of practices charged. In support of the conclusion that respondent has abandoned the practices complained of, the hearing examiner refers to respondent's prior course of

dealings with the Commission in connection with respondent's activities relative to certain trade practice conference rules for mail order and health and accident insurance. It is our opinion that while respondent's prior course of dealing with the Commission might have some bearing on respondent's good faith, the record as a whole does not support the contention that the respondent has in fact discontinued use of the practices alleged to be unlawful.

The facts are that respondent discontinued radio advertising in 1954, prior to commencement of this proceeding, and the hearing examiner correctly so found. Also, the record shows that use of a brochure which accompanied respondent's mailings to prospective customers likewise was discontinued at the same time. The radio script and brochure contained most of the representations alleged to be deceptive. However, there is no evidence that respondent has discontinued the use of ten form letters mailed in series to each prospective customer unless and until an application for a policy is forthcoming. (Since the latter part of 1954, a sample copy of the "New Provider" policy has accompanied all such letters in all mailings.) And, from our examination of these form letters, received in the record as exhibits, we conclude that respondent is continuing the use of most, if not all, of the deceptive representations, or statements substantially similar to them—all as more particularly set forth in the Commission's findings of fact herein. We also are of the opinion that the fact that a sample copy of respondent's "New Provider" policy currently accompanies each of the series of ten form letters does not cure the patently deceptive nature of the misrepresentations contained in those form letters. In *American Hospital and Life Insurance Company, supra,* in similar circumstances, the Commission held as follows:

> "Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself

is likely to induce a prospect to purchase respondent's insurance.

"Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to which respondent's unrestricted representations of coverage for illness or accidents are untrue. 'Under repeated decisions, the purchaser is entitled to rely upon the representations made. He need not distrust what is told him. * * * It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point.' *United States* v. *Sylvanus*, 192 F. 2d 96, 105 (7th Cir. 1951) cert. denied, 342 U.S. 943 (1952).

"If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp. v. F.T.C.*, 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts are made known to the purchaser before he enters into the contract of purchase. *Carter Products, Inc.* v. *F.T.C.*, 186 F. 2d 821, 824 (7th Cir. 1951).

"Another questionable premise in the examiner's reasoning is that 'any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence.' Apart from the fact that the Federal Trade Commission has the duty to protect not only the 'reasonably intelligent' but also the ignorant, the unthinking, the credulous, and the inexperienced, *Charles of the Ritz Dist. Corp.* v. *F.T.C.*, 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common knowledge—if it be a fact—is generally known even

> to the 'reasonably intelligent.' It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents."

These principles are controlling here and the hearing examiner clearly erred in holding that respondent has discontinued the practices questioned in the complaint in this proceeding with reasonable assurance that they will not be resumed. The facts of record are to the contrary. The initial decision will be modified accordingly.

Having thus ruled on the matter of discontinuance, the Commission has before it only two other questions for consideration. Are respondent's representations as to the renewability and duration of its "New Provider" policy deceptive and misleading? Has respondent misrepresented the general classes of sickness and accidents against which the policy indemnified, including ill[illegible]s originating before issuance of the policy?

The hearing examiner's initial decision found that respondent's representations as to amounts payable for surgical operations (Initial Decision, Paragraphs 14 through 19, both inclusive) and as to travel death benefit provisions (Initial Decision, Paragraphs 20 through 24, both inclusive) constitute misleading and deceptive advertising. With these findings we are in agreement and we do not propose to disturb them.

On the matter of renewability or duration of respondent's policy, the hearing examiner dismissed the charges of the complaint on the authority of *American Hospital and Life Insurance Company, supra.* In this connection, counsel supporting the complaint point out that the particular charge in the *American Hospital* case was dismissed by the Commission because the advertising stated

"NO AGE PROVISION terminating or reducing benefits because of increasing age." The Commission held such statement literally to be true inasmuch as respondent's policies did not contain a provision reducing benefits because of age.

Here, respondent, in its form letters, states as follows:

> "Benefits do not reduce because of age." (Comm. Exs. 3, 10, 18.)
>
> "There is no reduction in benefits, ever." (Comm. Ex. 8.)
>
> "There is no reduction of benefits for minors or older persons * * * nor is the policy ever cancelled because of age * * * persons up to age of ninety are eligible." (Comm. Ex. 22.)
>
> "The policy will not be cancelled, ever, because of age." (Resp. Ex. 8.)

We conclude that such statements give the impression that respondent's "New Provider" policy will continue in effect with full indemnification so long as the insured pays premiums and that such representations constitute false and misleading representations that respondent's policies may be kept in force continuously at the option of the insured when, in fact, the policies are terminable at any premium date at the option of respondent. *National Casualty Company*, Docket No. 6311, decided May 21, 1956.

The fourth specific misrepresentation charged in the complaint is that respondent has falsely and deceptively represented that its "New Provider" policy, with certain specific exemptions, indemnifies against losses or expenses resulting from *any or all* sicknesses and accidents. On the facts as disclosed by the record, the hearing examiner found that respondent misrepresented the scope of sickness and accident coverage provided by its policy because of inadequate disclosure in advertising of the exceptions to such coverage as provided in the policy.

The examiner further found, however, that respondent's advertising is not susceptible of the interpretation that it represents that its policy covers all sickness or accidents arising out of conditions which existed prior to the effective date of the policy, and, this finding is assigned as error by counsel supporting the complaint.

The initial decision (Paragraphs 30, 31 and 32) interprets the complaint as alleging that respondent's advertising is deceptive because it represents, contrary to the fact, that its policy does not cover childbirth and certain other conditions. The Commission does not construe the complaint as so charging and is of the opinion that the pertinent portions of the complaint involved[1] merely recite conditions represented in respondent's advertising as being expressly excluded from indemnification under the policy for the purpose of emphasizing conditions that were not clearly shown in respondent's advertising as not being covered by its "New Provider" policy. It follows, therefore, that there is no basis for the findings contained in the aforesaid paragraphs of the initial decision.

As to the appeal of counsel supporting the complaint, we agree that respondent's advertising inescapably implies that coverage of its policy is comprehensive but for the exceptions stated in said advertising. It is clear that respondent's "New Provider" policy by its express terms specifically provides that it does not indemnify for "any condition which was in existence prior to the effective date of this policy." Respondent's representations in this regard are incomplete and at variance with the policy provisions and, therefore, are deceptive and misleading.

The appeal of counsel supporting the complaint should be granted. An order modifying the initial decision in

[1] Complaint Paragraph Six (4), and Paragraph Seven (4).

accordance with the foregoing considerations and including an order to cease and desist in conformity with this opinion will be entered in lieu of the order of dismissal by the hearing examiner.

April 19, 1957.

[Caption omitted]

Concurring Opinion of Chairman Gwynne and Commissioner Tait

It is our view that the Commission has jurisdiction herein for the reasons outlined in the concurring opinion in Travelers Health Association, Docket 6252, and the dissenting opinion in North American Accident Insurance Company, Docket 6456. It also should be noted that the respondent here admits the jurisdiction of this Commission.

The order should be limited accordingly.

April 19, 1957.

[Caption omitted]

The Final Order of the Federal Trade Commission

Counsel supporting the complaint having timely filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision granting the appeal of counsel supporting the complaint and directing modification of the initial decision in conformity with the Commission's opinion:

It Is Ordered that the following paragraphs numbered 10 and 11 be, and they hereby are, substituted for

Paragraphs 10 through 13, inclusive of the findings of fact contained in the initial decision:

"10. The following and similar statements appearing in respondent's advertising material constitute the basis for this charge of misrepresentation:

(1) 'Benefits do not reduce because of age.'

(2) 'There is no reduction of benefits, ever.'

(3) 'Benefits are not reduced because of age.'

(4) '* * * There is no reduction of benefits for minors or for older persons. The premiums are NOT increased because of age (except in the case of children when they attain age 18) nor is the policy ever cancelled because of age. Hospital rooms, board and general nursing care benefits are paid for one day and up to one year if you have to stay that long. * * *'

(5) 'The policy will NOT be cancelled EVER because of age.'

(6) '* * * the features and liberal benefits are available to all from birth to 65 years of age who are in good health. * * *'

"11. Through use of the foregoing statements and others of similar import respondent directly or by implication has represented that its 'New Provider' policy will continue to offer protection to an insured up to age 65 with full indemnification. To a prospective purchaser of such a policy this is an important feature. In fact, however, the policy specifically provides that the respondent at its option may refuse to accept any renewal premium for any reason whatsoever, thus, in effect cancelling its contract with the insured. Under the express terms of the policy an insured may be cancelled out on any premium anniversary date even though he may have paid premiums over a period of many years without having made any claim whatever upon respondent."

IT IS FURTHER ORDERED that the following paragraph be, and it hereby is, substituted for Paragraph 29 of the initial decision:

> "27. In addition to the general charge, there are some specific charges alleged. One of these is to the effect that respondent represented by implication that its 'New Provider' policy indemnifies for loss of time due to conditions existing prior to the effective date of the policy which are not listed on insured's application for a policy. In truth and in fact respondent's 'New Provider' policy expressly excepts from its coverage any indemnity for * * * any condition which was in existence prior to the effective date of this policy or at the time of any reinstatement * * *. Thus, respondent indicates its coverage is all inclusive with certain exceptions; but when compared with the policy these statements are misleading and deceptive."

IT IS FURTHER ORDERED that Paragraphs 14 through 28, both inclusive, of the initial decision be renumbered 12 through 26, both inclusive.

IT IS FURTHER ORDERED that Paragraphs 30 through 36, both inclusive, be deleted from the initial decision.

IT IS FURTHER ORDERED that the following paragraphs be, and the same hereby are, substituted for that portion of the initial decision designated "III. *Conclusions.*"

"III. *Conclusions*

Upon the basis of the entire record the following conclusions are reached:

1. The Federal Trade Commission has full jurisdiction of this proceeding.

2. The public interest in which this proceeding is brought is clear and substantial.

3. Actual deception need not be shown, tendency or capacity thereto, from the representations made, being sufficient.

4. The use by respondent of the statements and representations as found herein to be deceptive and misleading, as they relate to the terms and conditions of its policies of insurance, and the failure by respondent to reveal the limitations of the coverage of said policies, have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce the purchase of said policies of insurance because of such erroneous and mistaken belief.

5. The aforesaid acts and practices of respondent, as above set forth, are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices within the intent and meaning of the Federal Trade Commission Act."

IT IS FURTHER ORDERED that the following order be, and it hereby is, substituted for the order contained in the initial decision:

"IT IS ORDERED that the respondent, American Life and Accident Insurance Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from representing, directly or by implication:

1. That any such policy may be continued in effect by the insured upon payment of stipulated premiums, indefinitely or for any stated time, unless full disclosure of any other provision or condition of termination contained in the policy is made conspicuously, prominently, and in sufficiently close conjunction with the representation as will fully relieve it of all capacity to deceive.

2. That said policy provides for payment in full or in any specified amount or for payment up to any specified amount for any medical, surgical or hospital

service, unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented, or unless full disclosure of the schedule of payments for which the policy provides is made conspicuously, prominently and in sufficiently close conjunction with said representation as will fully relieve it of all capacity to deceive.

3. That said policy provides for indemnification against losses due to sickness or accident, unless a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnifications actually provided are set forth conspicuously, prominently, and in sufficiently close conjunction with said representations as will fully relieve it of all capacity to deceive.

4. That said policy provides for a stipulated sum to be paid upon the accidental death of the insured unless full disclosure of the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided is set forth conspicuously, prominently, and in sufficiently close conjunction with the representation as will fully relieve it of all capacity to deceive."

It Is Further Ordered that respondent, American Life and Accident Insurance Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

It Is Further Ordered that the initial decision of the hearing examiner, as modified herein, is hereby adopted as the decision of the Commission.

By the Commission.

(Seal)

s/ Robert M. Parrish
Robert M. Parrish,
Secretary.

Issued: April 19, 1957.

The Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,828

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition to Review Decision of the Federal Trade Commission

[May 16, 1958.]

A. ALVIS LAYNE, JR. (T. S. L. PERLMAN, KENNETH TEASDALE AND COBBS, ARMSTRONG, TEASDALE & ROOS were with him on the brief) for Petitioner.

E. K. ELKINS, Attorney, Federal Trade Commission (EARL W. KINTNER, General Counsel, JAMES E. CORKEY, Assistant General Counsel and EDWIN S. ROCKEFELLER, Attorney, Federal Trade Commission, were on the brief) for Respondent.

Before GARDNER, *Chief Judge*, and JOHNSEN, *Circuit Judge*, and DUNCAN, *District Judge*.

GARDNER, *Chief Judge*.

This matter is before us on petition to review an order of the Federal Trade Commission requiring petitioner to cease and desist from certain unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act as amended, 15 U.S.C. Section 41 et seq. The order was issued after hearing on a complaint charging that the petitioner had, in the course of its

interstate business of selling accident and health insurance, falsely advertised its insurance policies and thereby violated the Federal Trade Commission Act. Petitioner answered admitting the use of the advertisements alleged but denied that its advertising was false or misleading or that it had violated the act. It also affirmatively alleged that prior to the issuance of the complaint members of the Commission's staff had reviewed its advertising and found it unobjectionable. On the issues thus joined a hearing was had before an examiner who, after said hearing, in due course entered an initial decision which in effect held that petitioner's advertising representations had been unfair, misleading and deceptive in certain respects, but that the acts and practices complained of had been discontinued and there was no reasonable likelihood that they would be resumed, and on that ground entered a provisional order dismissing the complaint without prejudice. From that part of the provisional order dismissing the complaint counsel supporting the complaint appealed to the Commission. No appeal was taken by petitioner from that part of the provisional order determining that it had violated the act by its deceiving and unfair advertising practices, and in its answering brief before the Commission it declared that:

> "Respondent has not insisted upon its denials of jurisdiction or of violation * * *. It has filed no appeal from the Examiner's findings of jurisdiction or of violation; and if further assurance is needed, it is now prepared to concede it has violated the law and that the Commission has jurisdiction."

The examiner found the advertising of petitioner violative of the provisions of the Federal Trade Commission Act in the following particulars:

1. That is misrepresented the amounts paid as benefits for surgical operations;

2. That it misrepresented the extent of coverage for death resulting from travel accidents; and

3. That it misrepresented that, except for specific stated limitations, the policies provided indemnification for losses or expenses resulting from any or all sicknesses or accidents.

These specific findings were approved and adopted by the Commission and in addition it found that petitioner had misrepresented that its policies might be kept in force continuously at the option of the insured. The Commission found all representations charged in the complaint to have been false and misleading and also found, contrary to the finding of the trial examiner, that the deceptive practices had not been discontinued. It thereupon entered its order requiring petitioner to cease and desist from representing, directly or by implication:

> "1. That any such policy may be continued in effect by the insured upon payment of stipulated premiums, indefinitely or for any stated time, unless full disclosure of any other provision or condition of termination contained in the policy is made conspicuously, prominently, and in sufficiently close conjunction with the representation as will fully relieve it of all capacity to deceive.
>
> 2. That said policy provides for payment in full or in any specified amount or for payment up to any specified amount for any medical, surgical or hospital service, unless the policy provides that the actual cost to the insured for that service will be paid in all cases up to the amount represented, or unless full disclosure of the schedule of payments for which the policy provides is made conspicuously, prominently and in sufficiently close conjunction with said representation as will fully relieve it of all capacity to deceive.
>
> "3. That said policy provides for indemnification against losses due to sickness or accident, unless a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnification actually

provided are set forth conspicuously, prominently, and in sufficiently close conjunction with said representations as will fully relieve it of all capacity to deceive.

"4. That said policy provides for a stipulated sum to be paid upon the accidental death of the insured unless full disclosure of the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided is set forth conspicuously, prominently, and in sufficiently close conjunction with the representation as will fully relieve it of all capacity to deceive."

Petitioner is an insurance company organized under the laws of the State of Missouri but it does an extensive business in states other than that of Missouri and conducts what is referred to in the record as a mail order insurance business in states other than Missouri. In its mail order insurance business it contacts its prospective customers by sending advertising material to them by mail and by broadcasting its advertising material over the radio. The advertising matter here in question pertains to its hospitalization and surgical policy called the "Provider" or "New Provider" policy which provides indemnity for loss of life by accidental bodily injury, for hospitalization and surgery due to sickness or accident and, through the use of various riders, can be modified or enlarged to cover a variety of contingencies. The names of prospective customers were received by petitioner from its existing policyholders and from radio advertising over various radio stations. It was the practice of petitioner upon receipt of the name of a prospective customer to send a form letter, which was always accompanied by a brochure describing the policy, two application forms and a return envelope. At times other advertising materials describing benefits or containing favorable comments from policyholders were enclosed with these letters. If favorable replies were not received from the first letter within about ten days a second letter of similar import was sent out and

this practice was repeated from time to time. The practice contemplated that the customer would send an application and initial premium payment by mail. No medical examination was required. The statements contained in the applications were relied upon by petitioner. There was no material conflict in the evidence.

In its petition to review the decision of the Commission petitioner in effect charges error in the decision of the Commission in the following respects: (1) The Commission erred in refusing to consider its own trade practice rules and in excluding evidence of petitioner's compliance with the trade practice rules, and (2) The Commission erred in striking the examiner's findings that the practices complained of had been abandoned.

It is argued by petitioner that the so-called trade practice rules had the force and effect of law and that its advertising material had been examined and approved by certain advisory attorneys of the Commission as not violative of these trade practice rules. Whether they should be so construed would not seem to be here material because petitioner is not charged with a violation of these trade practice rules but is charged with a violation of the Federal Trade Commission Act. Section 45(a)(1) of that Act, so far as here pertinent, reads as follows:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Section 45(a)(6) of the same act provides that:

> "The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

As has been observed the examiner found petitioner guilty of violation of the Federal Trade Commission Act

in several particulars, but the examiner in his provisional order found that petitioner had discontinued the practices. Counsel supporting the complaint appealed from that part of the order finding that petitioner had discontinued the unlawful practices. Petitoner, however, did not appeal from that part of the order which found it guilty of such practices but, on the other hand, specifically disclaimed that it was contesting the findings of the examiner in that regard. Having filed no cross-appeal to the Commission it in effect supported the order of the examiner as entered. In *Barnsdall Refining Corp.* v. *Cushman-Wilson Oil Co.*, 8 Cir., 97 F.2d 481, we announced the rule as follows:

> "The successful party, in the absence of a cross-appeal, can not be heard to urge error in the trial of the action."

There was therefore not presented to the Commission the question of the sufficiency of the evidence to sustain the findings of the examiner on the issue of petitioner's unlawful practices. This is made clear in petitioner's answering brief on appeal to the Commission wherein it is declared that:

> "Respondent has not insisted upon its denials of jurisdiction or of violation * * * It has filed no appeal from the Examiner's findings of jurisdiction or of violation; and if further assurance is needed, it is now prepared to concede it has violated the law and that the Commission has jurisdiction."

In this state of the record petitioner cannot now be heard to contend that the evidence is insufficient to sustain the findings of the examiner adopted by the Commission. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143. In *United States* v. *Tucker Truck Lines*, supra, the Supreme Court declared inter alia:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as

> a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

The governing rule is stated by the Supreme Court in *Unemployment Comm'n* v. *Aragon*, supra, as follows:

> "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."

The admission of petitioner at the trial of the issues before the Commission that the examiner's findings of deception were correct certainly warranted the Commission in approving and adopting them.

It is next urged that the Commission erred in finding, contrary to the provisional order of the examiner, that the deceptive practices had not been discontinued. Petitioner has not abandoned its practice of sending through the mail its form letters and application forms. These were held to contain deceptive representations. The brochure was omitted from the letters and a miniature policy form was enclosed. The miniature policy was of necessity in small print and of very considerable length. The letters and other enclosures were much more easily read and it cannot be said that the miniature policy enclosed was read and relied upon, rather than the letters and enclosures. Apparently petitioner was not satisfied to rely solely upon the statements made in the policy as its advertising material; otherwise it would not have continued to enclose the form letters. It being established that the form letters were deceptive, there is no certainty that they would not be relied upon by the recipients. It is significant too that the form letters made no reference to

the fact that a miniature copy of the policy was enclosed. The fact that there was no evidence that anyone had in fact been deceived in relying on petitioner's advertisements was not conclusive. The test was whether such advertisements were likely to deceive. *Cleo Syrup Corporation* v. *Coca-Cola Co.*, 8 Cir., 139 F.2d 416. These deceptive form letters and applications might not have deceived shrewd, experienced businessmen but they were sent indiscriminately to names secured by petitioner from its policyholders, or by radio advertising. These doubtless included, or might have included from time to time, all classes and conditions, educated or uneducated, and the recipients were warranted in relying upon the statements contained in these letters and we cannot presume they suspected the honesty of those with whom they transacted business. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112; *United States* v. *Sylvanus*, 7 Cir., 192 F.2d 96. In *Federal Trade Commission* v. *Standard Education Society*, supra, the Supreme Court said:

> "Laws are made to protect the trusting as well as the suspicious."

And in *United States* v. *Sylvanus*, supra, the court said:

> "Under repeated decisions, the purchaser is entitled to rely upon the representations made. He need not distrust what is told him. * * * It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point."

In *Dorfman* v. *Federal Trade Commission*, 8 Cir., 144 F.2d 737, it was contended that the order to cease and desist entered by the Commission was too broad in that it required orders of purchasers to be clear and under-

standable, both as to quantity of merchandise purchased and the price to be paid. Answering this contention we said, inter alia:

> "If to accomplish this purpose a blank order form is used which is not clear without an extension of the totals, then such extension is required. It is within the power of the Commission to require the preparation of orders for interstate sales which shall be clear not only to experts but which may also readily be understood by *'that vast multitude which includes the ignorant, the unthinking and the credulous.' Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 2 Cir., 178 F. 73, 75." (Italics supplied)

These form letters in many particulars contained direct appeals to their recipients. For instance, the recipient was exhorted to "mail your application right now"; "Mail your application Now"; "apply now * * * Fill out and sign the enclosed enrollment form today"; "mail the enclosed application right now * * * Mail your application today"; and "Send in your application right now". As hereinbefore noted, these letters contained no reference to the enclosed miniature policy nor any suggestion that the provisions of the policy be read. We are of the view that the evidence warranted the finding and conclusion that petitioner had not discontinued its unfair and deceptive practices.

It is argued by petitioner that its course of conduct persuasively indicates that it has at all times been cooperative in its attempt to comply with and follow any directions or commands of the Commission and that the filing of the complaint was unnecessary and without warrant. Under the law it was the duty of the Commission to prevent the use of unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, and the only method provided by law for enforcement is by the issuance of an appropriate order to cease and desist. We cannot say that there was an abuse

of discretion in following the procedure specifically authorized by law.

We have considered all the other contentions urged by the petitioner but think they are not pertinent to the controlling issues and hence without merit. The cease and desist order appealed from is therefore affirmed and a decree of enforcement will be entered.

JOHNSEN, *Circuit Judge*, dissenting.

The Federal Trade Commission promulgated "Trade Practice Rules Relating to the Advertising and Sales Promotion of Mail Order Insurance", 15 Fed. Reg. 955. It invited members of the industry to become signatories to those Rules, in indication of any such member's desire to secure cooperative achievement, both in its own business and in the field generally, of the purposes of the Act. It set up a Rules Administration Division, in facilitation of this endeavor, to enable any signatory, among other things, to submit its forms of advertising and solicitation for scrutiny and suggestion, with either expression or implication of sanction or approval, as being in conformity with the standards of the Rules and so presumptively non-violative of the Act. It allowed the Staff of its Rules Division to exercise the functions of advisorily engaging in such sanctions and approvals of forms of advertising and solicitation thus submitted. Then, in petitioner's case, it stepped in—without revocation of the Rules, without notice of repudiation of its Staff's actions, and without request on petitioner to cease further use of such materials—filed a complaint requiring petitioner to show cause why a cease and desist order should not be entered against it, and on hearing, with no challenge as to the good faith of the seeking or granting of such approval, entered a cease and desist order against petitioner, as a violator of the Act, in having made use of some of such Staff-sanctioned advertising and solicitation forms.

Beyond this, it preliminarily ruled as to the hearing had that evidence as to the facts referred to in the preceding paragraph could be "in no way relevant or material to any issue in the proceeding", so that petitioner was precluded from having such evidence considered, either on the merits of the question of deceptiveness in practical aspect, or as an element on the need for a cease and desist order in the circumstances of the particular situation.

It seems to me that this constituted fundamental lack of fair play in administration and processive arbitrariness in hearing. I do not believe that a use of advertising or solicitation forms, approved by the Commission's Staff, under trade practice rules promulgated by the Commission and under sanctioning procedures authorized by it in relation thereto, can constitute such "deceptive act or practice" as the Act contemplates should be made the subject of a cease and desist proceeding, and on which the Commission may presume to speak—until after there has been a removal of its administrative insulation.

That administrative insulation has, of course, now been removed in the present situation by the indications made in the rulings and results of this proceeding. But in effecting the deinsulation, the Commission should not, within the purpose and spirit of the statute, be allowed to pillory petitioner as a law violator, in the fists of its competitors and in the eyes of the public, for what was done, not as petitioner's act alone, but as an act of purported administrative insulation.

I would remand the case to the Commission, with leave to hold open the complaint, until it is seen whether further use is made by petitioner of the deinsulated material, and on that basis to enter a cease-and-desist or dismissal order.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

The Judgment and Final Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,828

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Final Decree Enforcing Order to Cease and Desist

American Life and Accident Insurance Company, a corporation, petitioner herein, having filed in this Court on June 27, 1957, a petition to review and set aside an order to cease and desist issued against it on April 19, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "IN THE MATTER OF AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY, a corporation, Docket No. 6238"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on March 5, 1958; and this Court having thereafter fully considered the cause and having rendered its decision on May 16, 1958, affirming said order:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to review be, and it hereby is, dismissed, that the aforesaid order to cease and desist, as heretofore affirmed, be, and it hereby is, enforced, and that petitioner be, and it hereby is, commanded to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days from date of issuance of certified copy of this decree to the Federal Trade Commission the petitioner file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

June 13, 1958.

The Order Denying Petition for Rehearing in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15,828

September Term, 1957.

Friday, June 13, 1958.

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

Petition to Review Decision of the Federal Trade Commission

Petition for rehearing filed by petitioner in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

June 13, 1958.

APPENDIX C

The Final Opinion and Order in the Federal Trade Commission, and the Opinion, Judgment, Final Order, and Order Denying Petition for Rehearing in the Court of Appeals in Automobile Owners Safety Ins. Co. v. FTC, Dkt. No. 15830 (8th Cir. 1958)

The Final Opinion of the Federal Trade Commission

[Caption omitted]

By Secrest, Commissioner:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing

examiner's initial decision filed October 4, 1956, dismissing the complaint without prejudice, and respondent's answer in opposition thereto.

The complaint charges respondent, Automobile Owners Safety Insurance Company, with violating the Federal Trade Commission Act, as that Act is applicable to the business of insurance under Public Law 15, 79th Congress (Title 15, U.S. Code, Sections 1011 and 1015), by disseminating false and misleading advertising relating to accident and health insurance policies which it has sold in commerce.

Respondent is a corporation doing business under the laws of the State of Missouri, with its office and principal place of business in Kansas City, Missouri. Respondent is licensed to engage in the business of insurance in Missouri, but in no other state. It sells accident and health insurance policies to purchasers and insureds located in every state except Virginia. The record shows that respondent's manner of doing business has been through the use of the mails. Solicitation has been entirely by mail; no advertising by newspaper, magazine, radio, television or other medium has been used. The mailings have included form letters and application blanks. Upon the approval of applications, policies were issued and mailed to insureds.

The advertising representations at issue in this proceeding have been made with respect to the promotion of the sale of insurance policies issued under forms designated 1-29-53 and F-8-10-53.

In connection with the solicitation for policies issued under form 1-29-53, the following statement has been made in form letters disseminated by respondent:

> "* * * automobile accidents happen every day. If such a misfortune occurs and you are injured in an

automobile accident, you can have an income of $100.00 a month for life, while you are at home under medical care or hospitalized. Our policy insures you while driving or riding in any automobile, bus, or truck, and provides these benefits:

"1. $100.00 a month beginning the first day you are injured. The policy provides that if you have an automobile accident and you are confined at home or in the hospital under medical care, you will be paid at the rate of $100.00 a month from the first day of injury even for life."

The hearing examiner found that this statement did not disclose clearly the limitations and conditions in the policies such as, among others, that an automobile, truck or bus accident must have been the sole cause of injury or that the injury must have resulted in immediate disability. He concluded, therefore, that such advertising is unfair, misleading and deceptive.

The hearing examiner found, in addition, that representations contained in advertisements relating to the sale of policies issued under form F-8-10-53 were unfair and deceptive to the extent that not all of the exclusions, conditions and limitations in the policies are set forth conspicuously and prominently in such advertisements.

The complaint, however, was dismissed without prejudice by the hearing examiner on the ground that, under the circumstances, this would fully serve the public interest. The hearing examiner held that insofar as respondent has failed to comply with the requirements of the Federal Trade Commission Act, it has been by acts of omission rather than of commission; that respondent has demonstrated cooperation with the Commission; that the practices complained of were discontinued before the issuance of the complaint; that it is reasonable to

assume that they will not be resumed; and that all that could be accomplished by an order has been accomplished. In addition, the examiner points out that there is no evidence that anyone has ever been deceived or misled by respondent's advertising.

Counsel supporting the complaint in their appeal argue the matter on the basis that the only question presented is in connection with the alleged discontinuance of the practices found to be unlawful. It is clear that the examiner considered other factors in arriving at his decision, but it is possibly fair to say that his conclusion as to the alleged discontinuance was the most important; otherwise there would be no sufficient grounds for dismissal. For one thing, we cannot agree with the hearing examiner that the acts of the respondent found to be unlawful were acts of omission. The respondent has represented in a positive manner, by its advertising, that its policies provide insurance coverage which they do not in fact provide. Thus, this matter is not strictly one of failing to reveal limitations and conditions, even though the disclosing thereof would have prevented the advertising from being deceptive. This matter involves affirmative statements which are false or misleading and deceptive. We believe, therefore, the examiner erred to the extent that he did not so find.

Furthermore, the examiner's holding that the evidence fails to show that anyone has been deceived or misled relates to a subject which cannot be controlling. As we stated in the *National Casualty Company*, Docket No. 6311, it is not necessary that actual deception be proved or found under Section 5 of the Federal Trade Commission Act. A showing that the advertisements in question have a tendency or capacity to deceive is all that is required.

The other circumstances mentioned by the hearing examiner relate to the showing of the alleged discon-

tinuance of the practices found to be unlawful or to the likelihood that they will not be resumed in the future. Respondent's past cooperation with the Commission is relevant only in so far as it might indicate that respondent is not likely to resume such practices. The essential question before the Commission, therefore, is whether or not the showing in the record relative to the abandonment or the discontinuance of the practices found to be unlawful is of such a nature as to warrant dismissal of the complaint.

In approaching this question, the first consideration is that the Commission, under Section 5 of the Federal Trade Commission Act, has a duty to prevent the use of unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. The law provides only one effective method by which the Commission may discharge its duty and that is by the issuance of an appropriate order to cease and desist. The object, of course, is to stop the unfair practice. Therefore, in the somewhat exceptional circumstances where the practice has been surely stopped by the act of the party offending and the object of the proceeding has been attained, no order is necessary, nor should one be entered.

If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, an order to cease and desist is appropriate. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F.2d 321. The Commission has a broad discretion in making any such determination, although it must be a reasonable exercise of discretion.

In this instance, superficial circumstances may seem to present a good cause for dismissal. Several months prior to the issuance of the complaint, respondent discontinued the use of the particular policy forms with which its

unfair advertising was connected, and with this discontinuance respondent would have us find that all such unfair advertising had ceased, particularly since no evidence of repetition of the practices at a later date was introduced into the record.

The Commission, however, in view of its primary duty, must concern itself with factors other than a mere outward manifestation. In other words, we must inquire into whether or not the discontinuance is one of real substance. Does it have a high degree of finality so as to merit consideration for the exceptional treatment of a dismissal? There are some cases which are relatively obvious in this respect, such as where the discontinuance takes place long before the complaint issued or where there has been an abandonment of the entire method or type of business. No such circumstances are shown in this instance. Respondent stopped using the particular policy forms here involved in the very shadow of Commission action and after the Commission had instituted a general investigation of advertising practices in the accident and health insurance industry. There has been no showing of any discontinuance of the type of insurance coverage contained in such policy forms. Considering all the circumstances, we must conclude that there is little in this record to suggest that the unlawful practices have been finally and definitely discontinued. Conversely, there is no assurance that practices which have not been surely stopped will not be resumed in the future. We believe, therefore, that respondent should be prohibited by an appropriate order from again engaging in the practices found to be unlawful.

The appeal of counsel supporting the complaint is granted. Accordingly, the initial decision is vacated and set aside, and our findings as to the facts, made on the whole record including the initial decision, and conclu-

sions and order to cease and desist, are issuing in lieu thereof.

Chairman Gwynne dissented to the decision herein.

April 26, 1957.

[Caption omitted]

Concurring Opinion of Commissioner Tait

It is my view that the Commission has jurisdiction herein for the reasons outlined in the concurring opinion in *Travelers Health Association*, Docket 6252, and the dissenting opinion in *North American Accident Insurance Company*, Docket 6456. It also should be noted that the respondent concedes "that it has violated the law and that the Commission has jurisdiction."

The order should be limited accordingly.

April 26, 1957.

The Final Order of the Federal Trade Commission

It Is Ordered that respondent, Automobile Owners Safety Insurance Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any accident, health, hospital or surgical insurance policy, do forthwith cease and desist from representing, directly or by implication, that said policy provides for indemnification against losses due to sickness or accident, unless a statement of all the conditions, exceptions, restrictions and limitations affecting the indemnification actually provided for are set forth conspicuously, promi-

ently, and in sufficiently close conjunction with said representations as will fully relieve it of all capacity to deceive.

It Is Further Ordered that the respondent, Automobile Onwers Safety Insurance Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Chairman Gwynne dissenting.

(Seal)

s/ Robert M. Parrish
Robert M. Parrish,
Secretary.

Issued: April 26, 1957.

The Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,830

AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition to Review Decision of the Federal Trade Commission

[May 16, 1958.]

A. ALVIS LAYNE, JR. (T. S. L. PERLMAN and MAURICE E. BENSON were with him on the brief) for Petitioner.

E. K. ELKINS, Attorney, Federal Trade Commission (EARL W. KINTNER, General Counsel, JAMES E. CORKEY, Assistant General Counsel and EDWIN S. ROCKEFELLER, Attorney, Federal Trade Commission, were on the brief) for Respondent.

Before GARDNER, *Chief Judge*, and JOHNSEN, *Circuit Judge*, and DUNCAN, *District Judge*.

GARDNER, Chief Judge.

This is a companion case to *American Life and Accident Insurance Company* v. *Federal Trade Commission*, No. 15,828, 8 Cir., ... F.2d ..., in which we have already determined the issues. As in *American Life and Accident Insurance Company* v. *Federal Trade Commission*, supra, this proceeding was instituted by the Federal Trade Commission under Section 5 of the Federal Trade Commission

Act, 15 U.S.C. Section 41 et seq., charging that petitioner had been using unfair and deceptive acts or practices in interstate commerce and seeking an order directing petitioner to cease and desist therefrom. The charge was based on petitioner's use of certain allegedly misleading and deceptive representations in the advertising for sale of two policies of sickness and accident insurance.

Petitioner by its answer put in issue all the material allegations of the complaint. A hearing on the issues joined by the pleadings was had before a trial examiner who made findings sustaining the allegations of the complaint as to the deceptiveness of petitioner's advertising representations but found that the acts and practices complained of had been discontinued, and that it was reasonable to assume they would not be resumed, and he therefore entered a provisional order dismissing the complaint. Counsel supporting the complaint appealed to the Commission from that part of the provisional order dismissing the complaint. Petitioner did not appeal from the initial decision finding the acts and practices complained of unfair, misleadng and deceptive. On the hearing before the Commission petitioner specifically declared:

> "Respondent has not insisted upon its denials of jurisdiction or of violation. It has filed no appeal from the Examiner's findings of jurisdiction or of violation; and if further assurance is needed, it is now prepared to concede it has violated the law and that the Commission has jurisdiction."

The Commission approved the findings of the trial examiner finding that petitioner had engaged in deceptive advertising acts and practices as alleged in the complaint, and specifically found that its representations as to indemnification provided by its policies were false, misleading and deceptive. The Commission, however, refused to adopt the examiner's finding that the unfair and deceptive practices complained of had been discontinued

and that there was no reasonable ground for believing they would be resumed in the future. The Commission thereupon entered the order to cease and desist which is now before us for review.

Petitioner seeks reversal of the decision of the Commission and seeks to set aside its cease and desist order on the following grounds: (1) The Commission erred in refusing to consider its own trade practice rules and in refusing to produce or admit evidence of petitioner's compliance with the trade practice rules, (2) the Commission erred in setting aside the examiner's finding that there is no reasonable likelihood of petitioner's resuming use of its abandoned advertising, and (3) the Commission erred in finding the advertising misleading and deceptive.

As to ground number one, it need only be said that this contention cannot be sustained for the reasons set out in our opinion in the companion case, *American Life and Accident Insurance Company* v. *Federal Trade Commission*, supra. It cannot be consistently urged that there was any prejudicial error in rejecting certain proffered testimony going to the question that the petitioner, before using its advertising material, had consulted certain lawyers of the Commission's staff. The charge was not that the trade practice rules had been violated, but that certain provisions of the Federal Trade Commission Act had been violated. Having admitted the violation of this Act, as found by the examiner, the so-called excluded evidence could have no real bearing on the issues involved in the case.

In our view the only substantial question is whether or not the Commission erred in refusing to dismiss the complaint on the ground that the unlawful, misleading and deceptive practices had not only been abandoned but that there was no reasonable likelihood of their being resumed. It is argued that the Commission found that the unlawful practices

which had been established by the evidence and admission of the petitioner, had in fact been abandoned some three months prior to the institution of the present proceeding. We think this is not quite true. In discussing this question the Commission among other things found:

> "Respondent stopped using the particular policy forms here involved in the very shadow of Commission action and after the Commission had instituted a general investigation of advertising practices in the accident and health insurance industry. There has been no showing of any discontinuance of the type of insurance coverage contained in such policy forms. Considering all the circumstances, we must conclude that there is little in this record to suggest that the unlawful practices have been finally and definitely discontinued. Conversely, there is no assurance that practices which have not been surely stopped will not be resumed in the future."

This court has held that even where the unlawful practice has been abandoned the Commission is not obligated to assume that such practices will not be resumed. *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 8 Cir., 13 F.2d 673; *Arkansas Wholesale Grocers' Association* v. *Federal Trade Commission*, 8 Cir., 18 F.2d 866; *Federal Trade Commission* v. *Wallace*, 8 Cir., 75 F.2d 733. In *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, supra, there had been an abandonment of the deceptive practices some years before the complaint had been filed with the Commission. The court nevertheless sustained a cease and desist order in its substantial parts and in doing so said:

> "It is contended that the objectionable publications ceased four years before the complaint issued and there is no intention to renew them, therefore, there was no basis for the order as to such. It may be that the immediate inciting cause for the publications has vanished or is inactive. However, this is not of itself sufficient to vacate that part of the order although it

might be reason for refusing, without prejudice, an application for the enforcement thereof at this time."

In *Arkansas Wholesale Grocers' Association* v. *Federal Trade Commission*, supra, this court again had occasion to consider the argument that a cease and desist order entered by the Commission should not be enforced because the inhibited practices had been discontinued and in the course of the opinion said:

> "It is urged that many or all of the practices which formed the basis of the findings and order of the commission had taken place and had been discontinued some time prior to the filing of the complaint. This, if true, would not affect the jurisdiction of the commission nor the propriety of the order made, since the commission is not obliged to assume that such practices will not be resumed."

In *Federal Trade Commission* v. *Wallace*, supra, we reaffirmed the doctrine of our prior decisions as to the insufficiency of an alleged abandonment of the unlawful practice as a bar to the entry of a cease and desist order. It is there said:

> "Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order. A bill not specifically denied is a basis for a decree limited to future acts. There is no guaranty that the acts complained of will not be renewed if the relief prayed is denied. *Arkansas Wholesale Grocers' Association* v. *Federal Trade Commission*, supra; *Swift & Co.* v. *United States*, 276 U.S. 311, 48 S. Ct. 311, 72 L.Ed. 587; *Local 167, International Brotherhood of Teamsters, etc.* v. *United States*, 291 U.S. 293, 78 L.Ed. 804."

In the instant case, as in *American Life and Accident Insurance Company* v. *Federal Trade Commission*, supra, petitioner admitted the correctness of the findings of the

examiner as to the violations alleged, and it did not appeal to the Commission from those findings. The petitioner ceased the practices only after the Commission had instituted a general investigation of the advertising practices in the accident and health insurance industry. On the whole record the Commission was not satisfied that the unlawful practices had been finally and definitely discontinued and would not be resumed in the future. The Commission is a fact-finding agency and we cannot say that this was not a permissible conclusion based upon all the facts, the surrounding circumstances and in inferences that might reasonably be drawn therefrom.

Notwithstanding the fact that petitioner did not file a cross-appeal, presenting to the Commission the question of the sufficiency of the evidence to sustain the examiner's findings that it had committed the misleading and deceptive practices alleged in the complaint, and notwithstanding the fact that during the hearing before the Commission it specifically admitted that it had violated the law in the particulars found by the examiner, it now contends that the Commission erred in finding its advertising misleading and deceptive. We think the petitioner, in view of this record, cannot now be heard to urge this alleged error.

We have considered all the other contentions of petitioner and are of the view that they are without merit. The cease and desist order is affirmed and a decree of enforcement will be entered in due course.

JOHNSEN, Circuit Judge, dissents, for the reasons stated by him in the companion case hereto, No. 15,828, *American Life & Accident Insurance Co.* vs. *Federal Trade Commission.*

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

The Judgment and Final Order of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15830

AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION, *Respondent.*

Final Decree Enforcing Order to Cease and Desist

Automobile Owners Safety Insurance Company, a corporation, petitioner herein, having filed in this Court on July 2, 1957, a petition to review and set aside an order to cease and desist issued against it on April 26, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "IN THE MATTER OF AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY, a corporation, Docket No. 6239"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceedings, and the matter having been heard by this Court on briefs and oral argument on March 5, 1958; and this Court having thereafter fully considered the cause and having rendered its decision on May 16, 1958, affirming said order:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to review be, and it hereby is, dismissed, that the aforesaid order to cease and desist, as heretofore affirmed, be, and it hereby is enforced, and that petitioner be, and it hereby is, commanded to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days from date of issuance of certified copy of this decree to the Federal Trade Commission the

petitioner file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

June 13, 1958

The Order Denying Petition for Rehearing in the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15830

September Term, 1957

Friday, June 13, 1958

AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

Petition to Review Decision of the Federal Trade Commission

Petition for rehearing filed by petitioner in this cause having been considered by this Court, It is now here ordered that the same be, and it is hereby denied.

June 13, 1958.